UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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H. CHRISTINA CHEN-OSTER, et al.,

Plaintiffs,

v. 10 CV 6950 (LBS)(JCF)

GOLDMAN, SACHS & CO., et al.,

Defendants.

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New York, N.Y.
May 22, 2012
11:07 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

APPEARANCES

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Attorneys for Plaintiffs
BY: KELLY M. DERMODY
-and-
OUTTEN & GOLDEN, LLP
BY: ADAM T. KLEIN

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BY: BARBARA B. BROWN
CARSON H. SULLIVAN
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SULLIVAN & CROMWELL, LLP
BY: THEODORE O. ROGERS, JR.

(Case called)

THE COURT: This is a motion to set aside the report and recommendation of the magistrate on the grounds that -- well, why don't I let the movant state the grounds.

MS. BROWN: Thank you, your Honor.

Before I begin, your Honor, if I may approach the bench, I'd like to provide the Court and my opponents with a few excerpts from the record that I'm going to be referring to.

May I do so?

THE COURT: Yes.

MS. BROWN: Thank you.

Your Honor, this case is a misuse of the class action process post *Wal-Mart v. Dukes*. There may be some valid class actions after *Wal-Mart*, but this is not one of them.

What the plaintiffs are claiming here -- when they originally filed the case, it was just an undisguised copy of the *Wal-Mart* complaint. After the Supreme Court's decision, they came up and filed an amended complaint which tries to dress up their allegations in certifiable clothing, but they can't.

And as we look at what the plaintiffs have testified to that their complaints are with the personnel processes at Goldman Sachs, you will see that essentially what they're saying is that the exercise of discretion by first- and second-level managers has resulted in an adverse impact against

women.

THE COURT: Now, forgive me for interrupting --

MS. BROWN: That's fine.

THE COURT: -- I'm sure your well-prepared presentation. But the gist of the controversy, as I understand it, is whether prior to discovery it is so clear that the plaintiffs cannot allege facts and circumstances which would take this case out of the *Wal-Mart* ruling.

MS. BROWN: Right.

THE COURT: That's a very heavy burden, isn't it?

MS. BROWN: It may be a heavy burden, your Honor, but I don't shrink from the burden at all because let's look at what they're actually alleging here. This is a case --

THE COURT: What it is that they are alleging prior to discovery.

MS. BROWN: Well, the depositions of the named plaintiffs have been taken, and I want to read you just some short excerpts from their testimony because they talked about what they were concerned with.

THE COURT: Yes.

MS. BROWN: And what we have here is a case that involves all jobs except the entry level, all personnel decisions. It's not just promotions, it's not one rule, it's not one policy; it's all the divisions, the revenue divisions, essentially, four different businesses, companies, almost, at

Goldman Sachs. So you're starting off here with a case that is much more sprawling in its supposed reach than anything the plaintiffs have cited in any of the cases, except the *Bell* case where the court denied certification.

So we're dealing here with a very unusual set of allegations, that's No. 1, much broader than typical.

Second thing is they have a disparate treatment claim. What did the Supreme Court say in *Wal-Mart* about disparate treatment? It said unless the plaintiffs can show significant proof of a general policy of discrimination, they can't have a disparate treatment class action.

And what did plaintiff Christina Chen-Oster say? If you turn to tab 1C in the notebook, she was asked at her deposition, on page 489, and the question was: And your belief is that the grant of discretion to managers is intentionally done to discriminate against women?

And her answer was: I don't think that the performance review system was designed to be discriminatory, but I think the impact and the practice has resulted in a discriminatory result.

Then she was asked the same sort of question about the promotion process at page 516: And the element that you testified to about the MD promotion process that incorporates a nomination having to be made by a managing director -- which is the plaintiff's complaint here -- do you believe that's

discriminatory?

And the answer was: I don't think that the notion of the action of a manager nominating their employee to be managing director is in and of itself discriminatory, but I think the impact has been because there are far fewer women nominated than men.

And the other named plaintiff, Shanna Orlich, behind tab 1D, at pages 511 and 512, was asked question at line 15: What is the corporate policy that you claim affects the class adversely because of their sex?

And the answer was: The discretion that managers have over someone's incoming career. They can be placed or not placed in a role that will affect them long term career-wise, compensation, continued employment, business opportunities.

So what these plaintiffs themselves are saying is there is no intent to discriminate in the promotion, feedback, and compensation processes. It may have an impact, and I'm going to talk about that in a bit, but let's just talk about the disparate treatment claim here. So, they're saying there is no general policy of discrimination.

The way that they claim that bias has crept into some decisions is because first-level managers have been given the discretion to make decisions about how someone will be paid, what people will be on their feedback list, who will be nominated for promotion.

So the reality is that these are exactly the types of claims that the *Wal-Mart* court said wouldn't satisfy Rule 23(a). The mere claim by employees of the same company that they have suffered a Title VII injury gives no cause to believe that all of their claims can productively be litigated at once. And here there is no single policy that they are attacking. So as to the disparate treatment claim, your Honor, yes, let's just say there is nothing alleged by and sworn to by these named plaintiffs that would satisfy *Wal-Mart*.

And I think one thing your Honor has to do here, and I know the plaintiffs don't want to do it, and I think for courts that have operated under a pre-*Wal-Mart* Rule 23 body of law for decades, it's difficult to step back and realize that this is a completely different legal landscape. The court laid down principles of law about what plaintiffs could do to bridge the gap between their individual claims and class claims, and, at least as to disparate treatment, there is nothing here that would bridge that gap. So, as a matter of law, they can't pursue that claim.

THE COURT: Isn't there a procedure which would split the difference, that is, suppose the Court agreed with the magistrate that this is premature because there had been no discovery and said, therefore, the motion is denied because we agree with Magistrate Judge Francis that the plaintiffs are entitled to discovery on the sole issue of whether there is any

aspect of the procedures which take the case out of *Wal-Mart*, that discovery would be limited to a very brief period of time and that would be the sole area of question, then what would happen, what would happen if they would strike out because the inferences which you're drawing from this is all there is, there isn't any more; your task in defending that outcome in the appellate court would be a much simpler, easier one, and the case would go away.

The alternative, which is what you're proposing now, imposes on you the burden of satisfying an appellate court that there is no conceivable result that that limited discovery would permit that would bring the case outside the scope of *Wal-Mart*.

MS. BROWN: Your Honor, I actually think that if you are inclined to deny our motion as premature, I think that's a very good way for us to proceed.

And, in fact, we are proceeding and we have discovery ongoing. We've produced over a hundred thousand pages, maybe close to 200, of policy documents. And it's exactly what you said, it's aimed at is there a common policy that affects the entire class in a common way so that litigating it together will give a common answer.

So I think that kind of focused discovery is, if you're not going to grant the motion outright, is the right way for us to proceed because it will focus on this question that I

think really is dramatically different about whether they can meet this standard of a common question and a common procedure that actually yields a common answer. Because our view is, of course, the exercise of discretion by the managers yields all -- you have to look into each individual decision, as the Supreme Court said, to figure out whether there's bias working or not.

So should your Honor be so inclined, I think that kind of a phase is exactly the right approach post *Wal-Mart* in cases where it isn't clear on the pleadings or with the discovery so far. And that's in fact what the court in the *Bell v. Lockheed Martin* case did. They looked at the policy and process discovery, didn't need full discovery, didn't need *Daubert* motions, didn't need any of that and said can these plaintiffs show that there's a policy here that produces common answers, and they couldn't there so the Court denied it.

So if that's your Honor's inclination, I think that makes a great deal of sense.

I do think before we get to that there is one other aspect of the case that you could rule on as a matter of law where I think the magistrate went wrong, with all due respect, and that's the question of whether they can seek individualized monetary damages under 23(b)(2). I think the Supreme Court made it crystal clear you cannot do that because you have to have individualized hearings, and that's not appropriate for

the type of injunctive relief they're seeking.

And here we have former employees, which the Supreme Court said also under a very crystal clear statement cannot pursue injunctive relief. They make the point they ask for reinstatement, but the reinstatement request would ultimately be stricken because these plaintiffs did not challenge their termination or resignation from the company. They are challenging only incumbent employee issues. They don't have a claim for wrongful discharge here or discriminatory discharge.

So that piece, 23(b)(2), could be ruled on right now and there is no -- the magistrate's holding, as I say, is just contrary to the clear holding in *Wal-Mart* and in the *Bell v. Lockheed Martin* case. And none of the cases that plaintiffs cite have anything to do with these kinds of situations. They're all disparate impact cases having to do with tests and they don't say a thing about this kind of circumstance.

So I would ask your Honor to reject the magistrate's recommendation with respect to that 23(b)(2) issue on damages, and also with respect to the right of or the standing of former employees to seek injunctive relief.

THE COURT: Suppose I hear from the plaintiffs.

MS. BROWN: Certainly.

MS. DERMODY: Good morning, your Honor. Kelly Dermody for the plaintiffs.

So your Honor is exactly correct that this motion to

strike is procedurally premature and that is clearly the rule in this district and it's been articulated in a number of cases in the circuit as well: the *Chenensky* case, *Rahman*, *Barghout v. Bayer*.

It's clear that the issues that the defendants are raising will all be addressed in the context of a Rule 23 motion that will be based on an actual presentation of the facts and the evidence to support a class definition in a class that is framed by that evidence.

We're not anywhere close to that right now, your Honor. In fact, this case has really been hampered by stonewalling by the defendants. We have not received any data, no data at all. We have very, very few documents from the defendant, other than what they produced about the named plaintiffs. We've been fighting with them to get things as basic as organizational charts. We haven't had any depositions scheduled because of the stonewalling of discovery. It's been a very, very slow process out of the gate in this case.

So there's really only hypotheticals about what the class motion will look like, what the trial plan will be, and it would be improper at this stage for the Court to be asked to guess the scope of the case.

With respect to the deposition testimony that's been cited, I would just say I think it's somewhat out of context and misleading. It's not at all part of the complaint. So the

Court is being asked to infer that out-of-context comments in a deposition that lasted for two days somehow should be considered to be the plaintiffs' core allegations and that's just not what the law would provide.

Notwithstanding our assertion that that testimony is out of context and not proper for this motion, even if Goldman Sachs is correct about the meaning of that testimony, and we don't think they are, but even if they were, and the plaintiffs did allege that one of the core allegations here is that low-level managers exercised some discretion in a discriminatory manner, that would not itself make classification unavailable in this case.

In fact, your Honor, I would point the Court to the Seventh Circuit's recent decision in *McReynolds v. Merrill Lynch*. I think it's very helpful in this regard to understand really the limits of *Dukes* because I think in this instance Goldman Sachs has dramatically overstated that holding. In the Seventh Circuit case, Judge Posner, writing for the circuit, reversed a denial of Rule 23 certification by the district court in a case where managers exercised discretion through common practices involving assignments and compensation. And the Court recognized that some discretion existed, but those core company practices were the mode through which the manager discretion existed and that can satisfy commonality.

I'll note that the defendants themselves actually

characterized the *McReynolds* case earlier when it was a district court decision denying cert, and they said that *McReynolds* was a case of disparate impact excess subjectivity. But the Seventh Circuit nevertheless believed that that case was appropriate for certification and rejecting the idea that any discretion somehow makes the case incompatible with Rule 23.

We're concerned about defendant's what we think is sort of a tangent going off about phase discovery here. The plaintiffs have no interest in doing unnecessary or unduly costly or front loading discovery that won't be needed until after class certification. We have been very, very focused on tailoring discovery at this stage to get what we need to meet our high burden under IPO, and that includes getting the personal databases so we can do a proper analysis of the common practices that will show up when you analyze apples-to-apples people in the compensation, promotion, and performance systems. We still waiting for that data, and that's the subject of another motion before the magistrate judge.

We need to have some basic 30(b)(6) depositions about the core practices that are being challenged. The core practices will be the subject of our Rule 23 motion as required under *Dukes*. And we have really identified three things that are the critical pieces we're going after, and we're not using any superfluous time to chase after things that aren't covering

these practices. And they are the performance review system, including the 360-degree review and the forced ranking, the tap on the shoulder promotion system, and the compensation system, which is infected by problems with the performance management system and a failure to pay based on actual performance.

Now, I'll just point out that in the *Dukes* case, a class challenge to performance management was expressly approved as an appropriate type of system to challenge at a company, and that's at the Supreme Court's cite 2553. We have asked common questions in our complaint at paragraph 62. They include whether Goldman Sachs' performance evaluation system discriminates against women, whether its compensation system discriminates against women, and whether its promotion system discriminates against women. And 23(a)(2) commonality can be met because there are common answers to these common questions that will resolve common claims.

As for the (b)(2) standing issue, I think it's quite clear from the case law that when former employees seek reinstatement, they have an actual interest and a true threat of being harmed if an injunctive isn't issued to remedy the problems. This is much like a hiring situation where an applicant is seeking an injunction to change a biased hiring practice. If that applicant would be hired, that injunction would solve the problems the company has with discrimination.

So this is really no different. Here we have

employees who have filed allegations of unlawful termination in their EEOC charges. They seek reinstatement in their prayer for relief. This was not raised in *Dukes*. It wasn't an issue in *Dukes*. It wasn't an issue in that circuit in *Ellis v. Costco*. In the cases where it has been an issue, the *Levin* case in particular, the court has recognized the propriety of letting a person seeking reinstatement pursue an injunction to cure the problems in the company.

THE COURT: If I were to agree with Judge Francis that the motion is premature because there has not been discovery, would you be amenable to a subject matter timetable of discovery in which the first order of business would be discovery relevant to the -- I forget the term you use for the type of discovery, the type of processing which takes place, but obviously be geared to the defendant's principal contention that the *Wal-Mart* holding precludes the case and permit that issue to be the subject of a new application by the plaintiffs to the magistrate rather than go through a great deal of other matters which might become irrelevant?

MS. DERMODY: Thanks, your Honor. So, two things. First, plaintiffs would urge the Court to not only reach the issue of prematurity but to also reach the other issues that the magistrate judge addressed. They're we believe very useful in clarifying some of the issues that are going to come up on class certification and I think would be a great benefit in the

district to have that reasoning adopted to give clarity going forward.

The second thing is with respect to the discovery, your Honor, I'm not sure what that proposal would get us because right now we're operating really as a functioning phase discovery approach. We are really focused on class-related discovery. That's what we need right now and that's all that we're seeking. And in order for us to understand the limits or the applicability of *Dukes*, one has to understand that in the context of a Rule 23 motion based on evidence and a record.

So the way to go at deciding whether or not *Dukes* has any bearing on the viability of certification here is for plaintiffs to be allowed to meet their burden under IPO to get the evidence they need to demonstrate the requirements of Rule 23. Defendants can raise whatever arguments they have about how *Dukes* applies. We will rely on *Dukes* as well because we think *Dukes* helps us and that *Dukes* supports this case going forward and being certified. But each side will have a chance to frame their arguments under *Dukes* in the context of a real classification motion with a real record.

Otherwise, we'll be back here piecemeal arguing about whether we have enough information for the Court to make a determination out of context about *Dukes* when *Dukes* isn't the only case law that governs classification in this district, in this circuit, and in this country. *Dukes* is one piece. It's

very important, but we have a whole classification record to make here. And I think it would be inefficient and not really useful to the ultimate process and wouldn't really be, we don't think, any cost savings to do it that way, your Honor, because the very same discovery we need to do to show we meet *Dukes* is the same kind of discovery that we need to show that we meet class certification or Rule 23. It's going to be quite overlapping, and it should happen at the appropriate time for our Rule 23 motion.

We would be absolutely supportive, your Honor, if you wanted to set a schedule for when the motion should be filed and to get the parties moving forward on that being decided. That would be we think appropriate here. But piecemeal decisions about parts of discovery and fitting into parts of cases, that doesn't seem like it would help the Court at all and it certainly wouldn't help the parties, your Honor.

THE COURT: Wouldn't Magistrate Francis be the person to deal with that in the first instance to set that timetable?

MS. DERMODY: Yes, your Honor. I think that would be appropriate to keep looking at the discovery and he can understand the practical limitations of the calendar.

THE COURT: All right.

MS. DERMODY: Thank you, your Honor.

MS. BROWN: Your Honor, if I may, just a couple brief points about Ms. Dermody's argument, but then I want to get

back to your idea of phase discovery which I think plaintiffs are being very disingenuous in their response.

The phase discovery that your Honor is talking about is exactly what the Supreme Court in *Dukes* said should be done. And all the old cases that they want to talk about don't have any significance anymore. The *Robinson* case, the other cases, those are if not overruled certainly discredited.

Let me just go back to a couple of the points she made. The *McReynolds* case in no way has anything to do with this case. That case in the Seventh Circuit involved one job. It involved a hard and fast rule, a formula about how accounts were to be distributed. The court there held -- I don't think correctly, but it doesn't matter for our purposes here -- the court there held that it could look at the legality of that rule and then that would move forward the individual hearings that might later take place.

Here we have a completely different set of allegations. Here we have an attack, broad attack on every personnel practice, every job, every business, every criteria for success, every decision by hundreds of managers. So the *McReynolds* case says nothing about whether ultimately this case should be properly certified.

But what we do have here is exactly the kinds of allegations that would benefit from phase discovery because what the plaintiffs are saying is, well, there's a tap on the

shoulder promotion process -- exactly what the court in *Wal-Mart* said. If you look back at the allegations in *Wal-Mart*, the district court decision in 222 F.R.D., there wasn't, it wasn't an absence of standards. They had standards for promotion. You had to be in the job a year, you had to have a good evaluation, you had to be on a management training; and then the manager could pick from those people.

So what the court said wasn't enough in *Wal-Mart* is strikingly similar to here. The manager picks from those qualified. It's very much the same, and there isn't any other case law that tells judges at this point in time and parties what's enough.

So what we think the first phase should be -- and I think it's analogous in a sense to when the Court would have discovery about is there jurisdiction or is the venue issue appropriate -- is that we look at is there a general policy of discrimination. And we have produced, despite what Ms. Dermody said, hundreds of thousands of pages of policy and process documents. Let's see if they say that any of those are discriminatory. Let's have testimony about whether there's a process that's common over the years, over the divisions.

The thought of getting into data makes no sense at all at this point or individualized discovery because that is exactly what will bring what your Honor is trying to avoid. That will bring material that, first of all, the Supreme Court

said is utterly irrelevant. The fact that the processes have a statistical disparity against women tells us nothing about whether there's a common question that can efficiently be litigated here. So let's leave *Daubert* motions, discovery motions, data, individualized discovery out of it.

Let's look at processes, policies, and procedures and see if there is, your Honor, as you said, a common method of direction about how to exercise discretion, a common policy of discrimination or nondiscrimination or inclusion or diversity, and then let's come back and see, your Honor, and see if they can get over this hurdle because the world has changed. They don't want to acknowledge it. We don't need a full Rule 23 record here to determine this preliminary question that will in fact clarify the issues for all of us going forward because your Honor might conclude -- we don't think you will -- but you might conclude, as to this particular process, you can take further discovery and see about it. But as to the other things you're claiming, this attack on the entire method of personnel decision-making, no, we're not going to get into that.

So that's what I would urge your Honor to do.

THE COURT: Well, I will --

MS. DERMODY: Your Honor, a few quick points.

Just a point in favor of *McReynolds*, your Honor, I think that perhaps defense counsel misunderstands some part of the case because the case included a couple of different

practices, one of which involved teaming and the decision of what people could be included in partnerships. And the court recognized that that particular practice involved many decisions by many, many, many individuals to choose who would be on their teams, whether to be on a team or not, rife with discretion, and the court found that to be an appropriate claim to be certified.

The concept of phase discovery is not actually a new concept really. It's a concept that's been around in recent years in class action practice to get parties to focus on cost efficient ways to move the case along appropriately, and it's absolutely the right thing to do.

And the phasing goes like this. Before class certification, the parties shouldn't waste a lot of time focusing on damages because you don't know what case is going to be tried. So before class certification, you've got to focus on what are the common practices and how to meet the Rule 23 requirements. After certification, you focus on some of the merits, proof, and the damages issues. And that's exactly the process that we've been going through here and we think that's appropriate.

There is no case, not one anywhere in this country that has held that there should be phasing to focus on whether the plaintiffs have identified a policy that uses the words treat women differently in it before they can have any

discovery about the data that would show an adverse impact from a neutral policy or anything else in the case. That's not the law. It's not the law in this district. It would be absolutely turning Title VII upside down. That would just be inappropriate here.

The last thing we'll say is that we think that defendants have really overstated *Dukes*' effect on the *Robinson v. Metro North* Second Circuit case and the line of cases that follow that. While *Dukes* did address certain aspects of *Robinson*, it left intact the *Robinson* holding about bifurcating phases of a case.

So the notion that you can bifurcate for liability claims under (b)(2) and for damages under (b)(3) using 23(c)(4) to separate issues was approved in *McReynolds*. It wasn't disturbed by *Dukes*. It was approved in the *McReynolds* case by the Seventh Circuit after *Dukes*. It was also approved after *Dukes* by *Vulcan Society* in this district and -- in the Eastern District and by *Easterling*. It is still the law in this country involving how you try these cases, and we would urge the Court in moving forward to be thinking of this case as a (b)(2) liability case and (b)(3) damages case.

Thank you, your Honor.

THE COURT: All right. I'm going to reserve decision. I think the argument has been very helpful. And I'll try to give the matter as expeditious a processing as my calendar will

permit.

I also am keenly aware of what my role is and what the magistrate's role is, and I know a lot of things that we talked about this afternoon really deal with day-to-day processing of the case and will be happy to leave those to Judge Francis.

Thank you all and we're adjourned.

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